

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agree that the record includes the depositions of Dr. James Gardner and Dick Santner which were omitted from the ALJ's Award. The parties agree that if claimant's claim is compensable, then neither party disputes the 10 percent functional impairment assigned by the ALJ, nor do they dispute the compensation rate found by the ALJ of \$278.68. Respondent also concedes that the issue of preexisting impairment is no longer in dispute. Finally, again assuming compensability is found, respondent does not argue that claimant has made a good faith effort to find appropriate

employment following the injury which is the subject of this claim. Thus, respondent does not contest the 42.5 percent wage loss found by the ALJ.

### ISSUES

This case was the subject of a preliminary hearing in August 2002. At the conclusion of that hearing, the ALJ denied claimant's request for benefits concluding that "claimant did not suffer an accidental injury" and that her "alleged accidental injury did not arise out of and in the course of employment."<sup>1</sup> That Order was appealed to the Appeals Board (Board). On November 20, 2002, the reviewing Board Member reversed the ALJ and found claimant's claim compensable.<sup>2</sup>

Thereafter, the claim was litigated at a full hearing on July 22, 2004. In his Award, the ALJ noted that respondent offered no additional evidence bearing upon the issue of the compensability of claimant's accident. And because no further evidence was offered, the ALJ concluded there was "no reason to stray from the Board's prior decision."<sup>3</sup> Therefore, he awarded claimant a 10 percent functional impairment based upon the testimony of Dr. Dick Geis, the physician retained by claimant to provide a rating.

The ALJ also adopted Dr. Geis' opinions on the issue of task loss, specifically that claimant had lost the ability to perform 16 of 26 tasks. The 62 percent task loss was averaged with a 42.6 percent wage loss and yields a 52.3 percent work disability.<sup>4</sup> The ALJ made no mention of the testimony of Dr. James Gardner or Dick Santner, individuals deposed by respondent.

The respondent appealed the Award contending first and foremost that "the credible evidence shows that the [c]laimant was not injured at work but at home."<sup>5</sup> Alternatively, even if claimant has met her burden to establish a compensable injury, respondent argues the ALJ erred in failing to consider the opinions expressed by Dr. James Gardner, the treating physician, and those of Dick Santner, the vocational specialist retained by respondent. Respondent suggests that had the ALJ properly considered all of the

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<sup>1</sup> ALJ Order (Aug. 15, 2002).

<sup>2</sup> Appeals from preliminary hearings are reviewed by a single board member. All issues are thereafter subject to appeal and review by the entire Board following a regular hearing. K.S.A. 44-551.

<sup>3</sup> ALJ Award (Aug. 30, 2004) at 3.

<sup>4</sup> On page 4 of the Award, the ALJ erroneously indicated he was awarding claimant a work disability of 42.6 percent, rather than the 52.3 reflected in the body of the Award. This appears to have been a typographical error.

<sup>5</sup> Respondent's Brief at 9 (filed Oct. 13, 2004).

evidence, he likely would have averaged the task loss opinions, thus lowering the ultimate work disability finding to 49.3 percent.

Claimant requests that the Board affirm the ALJ's Award in all respects. Claimant believes the evidence sufficiently supports the ALJ's factual conclusions that she did suffer injury out of and in the course of her employment on April 18, 2002, and that she is entitled to a work disability award of 81 percent, based upon a 62 percent task loss and a 100 percent wage loss until April 22, 2004 when she found employment and her wage loss was reduced to 42.6 percent, resulting in a 52.3 percent work disability.

The issues to be resolved are as follows:

1. Whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent; and
2. Nature and extent of disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent Footlocker as a material handler 40 hours a week at \$10.45 per hour. She testified that fringe benefits were provided but no evidence was ever produced as to the value of those benefits.

Claimant testified that on Thursday, April 18, 2002 she injured her neck and shoulders while lifting and pushing a box onto a conveyor. According to claimant, the pain was not severe at first and she thought it would pass. For that reason, she did not inform her supervisor. Her pain complaints, particularly in the left shoulder, got worse the following day, Friday, April 19, 2002, which was a day the plant was shut down and she was not required to work. By Saturday, April 20, 2002, claimant says she "could barely move to get out of my own bed that morning. I couldn't even dress myself."<sup>6</sup>

Claimant went to Mercy Health Center's Emergency Department in Manhattan, Kansas for treatment. She utilized her private health insurance because she sought this treatment on her own and was not referred to this facility by her employer. The records indicate claimant reported an onset of pain occurring "yesterday".<sup>7</sup> Those same records

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<sup>6</sup> R.H. Trans. at 27.

<sup>7</sup> P.H. Trans. at 11, Ex. 1 at 31 (p. 2 of Emergency Dept. Nursing Assessment 4/20/02).

indicate claimant denied any history of injury but claimant testified that she told them she was injured while working. Claimant explained that while at the hospital, she was asked whether she hurt her shoulder at home on Friday as that was the date she noticed the significant onset of complaints. It was to that question that claimant says she denied sustaining any injury but explained that her pain complaints commenced on Friday while at home. The hospital sent her home with a soft cervical collar, medication and referred her to contact her personal physician, Dr. James Gardner, for further treatment.

Claimant called in to work on Monday, April 22, 2002, and left a message indicating that she would be unable to work that day.

On Tuesday, April 23, 2002, claimant was seen by Dr. Gardner. She advised Dr. Gardner that her neck and shoulder pain started spontaneously about 4 days before. During the course of his examination, Dr. Gardner observed neck spasms. His records indicate that she described her job as one that involved a lot of lifting but there was no mention of a specific injury.

Following her visit with Dr. Gardner on April 23, 2002, claimant testified she went to respondent's plant and notified Becky Patton, respondent's Health Care Coordinator, that she injured her neck and shoulders while working on April 18, 2002. According to claimant, Ms. Patton recommended claimant fill out a Family Medical Leave Act (FMLA) request form in case respondent denied her claim for workers compensation benefits. Claimant understood that this would protect her from accruing unexcused absences. Ms. Patton sent claimant home and told her to return on April 24, 2002 and complete the FMLA forms.

An Employer's Report of Accident, Form K-WC 1101-A, was completed by Ms. Patton and dated April 23, 2002. This same document reflects that claimant is or intends to have treatment with Occupational Health in Junction City, Kansas. As is her habit, Ms. Patton testified that she completed this document on April 26, 2002, the date she maintains claimant first advised her of a work-related injury. It is also her practice to set up an evaluation with the occupational facility on the same date she completes the accident report. When asked about this apparent inconsistency in the present action, she responded that she must have used April 23, 2002, as the date claimant first came to her to report physical complaints but that, according to Ms. Patton, claimant did not, at that first meeting on April 23, 2002, report her injury as having anything to do with work. It was only on April 26, 2002, that claimant advised she had hurt her neck and shoulders on April 18, 2002.

Claimant was then seen by Mr. Bryan Van Meter on April 25, 2002, *at respondent's direction and more importantly, the day before Ms. Patton says she was informed of a work related injury.* Mr. Van Meter is employed by the Occupational Health Clinic at Geary County Hospital and this facility would not have evaluated claimant unless she was referred to the facility by her employer. Mr. Van Meter reported the following history:

. . . patient presents to the Occupational Health Clinic today with complaint of severe left neck pain, left shoulder pain, left forearm pain, left thumb pain. The patient, according to her injury care sheet, stated that this occurred after taking a box on 4/18/02 in the a.m. and flipping it over. She went to push the box onto the conveyor belt. She felt a pain in her neck and shoulder at that time. She states she did not tell anyone because she did not have any significant pain, thought it would go away, but states on Friday it got worse.<sup>8</sup>

During the course of this examination, Mr. Van Meter indicated that he did not believe claimant could have injured herself pushing a box at work.<sup>9</sup> He then referred claimant back to her family physician for treatment.

Like Ms. Patton, Mitch Benton, claimant's supervisor, testified that claimant did not report a work-related injury until April 26, 2002. Rather, he reports that claimant appeared for work on April 23, 2002 and indicated that she injured herself over the weekend while changing her clothes. He recommended she contact the nurse as he believed she would not be able to work that day. Then on April 24th, he had another conversation with claimant. This time, Mr. Benton testified that claimant asked him if she could be fired for getting hurt off the job and having to take time off. Mr. Benton said "no", and said that there were different avenues she could take including FMLA leave or short term disability. These conversations are memorialized in memos which are generally in accord with Mr. Benton's testimony. However, Mr. Benton indicated he was not aware of claimant's testimony that she filled out an accident report on April 23rd for a work-related injury or that Ms. Patton, in turn, filled out such a document using April 23rd as the reporting date.

Then on April 29, 2002, claimant again saw Dr. Gardner and at that point she attributed her neck pain to a pulled muscle following lifting at work 4 days before April 23, 2002. He recommended a surgical consultation with a neurosurgeon. That specialist determined she was not a surgical candidate and Dr. Gardner then suggested injections which claimant apparently had done.

On August 15, 2002, a preliminary hearing Order was entered denying claimant's request for ongoing treatment with Dr. Gardner and for temporary total disability benefits. That preliminary hearing Order was reviewed and reversed. The matter was remanded to the ALJ for further preliminary proceedings and orders consistent with the Board's finding that claimant sustained a compensable injury.<sup>10</sup>

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<sup>8</sup> *Id.*, Ex. 1 at 58 (p. 1 of Van Meter Report 4/25/02).

<sup>9</sup> *Id.* at 14, Ex. 1 at 59 (p. 2 of Van Meter Report 4/25/02).

<sup>10</sup> Board Order (Nov. 20, 2002) at 5.

On August 18, 2002, claimant was terminated from respondent's employ as they could not accommodate her restrictions. At this point, Dr. Gardner had imposed restrictions that excluded lifting over 25 pounds and no overhead work. At the regular hearing she maintained that she had continually sought employment from that date forward, but was only recently successful. Claimant had sought assistance through SRS, Heartland Works and the WIA program. Claimant stated she applied for at least 5 jobs per week during this period.

In April 2004, claimant began working at a convenience store earning \$6.00 per hour, working 40 hours per week. Mr. Santner testified that this wage is appropriate given claimant's limited educational and vocational background. Monte Longacre testified that she could expect to make as much as \$250 per week working in fast food, as a desk clerk, taxi driver, or pizza delivery.

At her lawyer's request, claimant was evaluated by Dr. Dick Geis on February 24, 2004. Dr. Geis diagnosed cervical muscle strain, degenerative disc disease, disc protrusion and range of motion deficits in her shoulder. He assigned a 10 percent permanent partial impairment to the whole body, which he attributed to claimant's April 18, 2002 injury. In addition, he imposed restrictions of no lifting over 25 pounds, 10 pounds repetitively and no lifting or work over shoulder level.<sup>11</sup> Dr. Geis reviewed Monte Longacre's task analysis and opined that claimant had lost the ability to perform 16 of the 26 tasks outlined, leaving her with a 62 percent task loss.

Dr. Gardner also reviewed both task lists prepared by each of the vocational specialists. He opined that claimant had lost 14 of the 28 tasks itemized by Mr. Santner (50 percent) and 16 of the 26 tasks itemized by Mr. Longacre (62 percent).

In order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>12</sup>

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<sup>11</sup> Geis Depo. at 9.

<sup>12</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Following the regular hearing the ALJ found claimant's claim compensable. He noted that -

. . . [c]laimant was seen by the company physician on April 25 (during which she reported being hurt while flipping a box at work), and the [r]espondent's representative testified the [c]laimant could not have seen the company physician unless this visit had been authorized by the [r]espondent. The [r]espondent has had the opportunity following the preliminary hearing to present additional evidence to explain away this, but it has not tried to do so. . . Additionally, Dr. Geis has since testified that the [c]laimant's description of the incident of flipping a box was a competent cause of her injury.<sup>13</sup>

After considering the record as a whole, particularly the testimony of Ms. Patton, Mr. Benton, the corporate documents along with claimant's testimony, the Board concludes that claimant sustained a compensable injury on April 18, 2002. It only makes sense that claimant's notification on April 23, 2002 of the work-related nature of her physical complaints was the precipitating event that triggered the referral to the occupational facility. While there, she informed Mr. Van Meter of the event that caused her pain, providing the very same history related at the preliminary hearing and at the regular hearing. The Board affirms the ALJ's conclusion that claimant met with personal injury by accident arising out of and in the course of her employment.

The parties have stipulated that claimant sustained a 10 percent functional impairment. Because her injury does not fall within the statutory schedule of K.S.A. 44-510d, the Board must also consider whether claimant is entitled to permanent partial general bodily disability, or as it is more commonly known, work disability. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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<sup>13</sup> ALJ Award (Aug. 30, 2004) at 3.

This statute must be read in light of *Foulk* and *Copeland*.<sup>14</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. Here, respondent concedes claimant made a good faith effort to find post-injury employment. Thus, the ALJ concluded she was entitled to a 100 percent wage loss.<sup>15</sup> Thereafter, on approximately April 22, 2004 she obtained employment at a Shop Quik earning \$6.00 per hour and averaging 40 hours per week. Mr. Santner testified that this is appropriate employment given her background and skills. The ALJ found that claimant had, based upon her present \$240 a week wage, sustained a 42.6 percent wage loss. The Board affirms both of these findings.

As for the task loss component of the work disability formula, the Board finds there is no reason to discount or exclude Dr. Gardner's testimony as to task loss based upon the vocational analysis provided by Mr. Geis. Thus, the Board elects to average Dr. Geis' 62 percent task loss opinion with the 50 percent task loss offered by Dr. Gardner. When averaged, the result is 56 percent. The Board modifies the ALJ's Award and finds claimant sustained a 56 percent task loss as a result of her work-related injury.

Claimant's 100 percent wage loss, when averaged with a 56 percent task loss yields a 78 percent work disability. As of April 22, 2004, claimant's work disability is lowered to 49.3 percent based upon her 56 percent task loss and an actual wage loss of 42.6 percent.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

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<sup>14</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>15</sup> The ALJ's Award seems to reflect an imputed wage as the ALJ utilized the work disability percentage that included an imputed wage rather than a period reflecting 100 percent wage loss. The Board's Order corrects this error.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 30, 2004, is affirmed in part and modified in part as follows:

The claimant is entitled to 27.4 weeks of temporary total disability compensation at the rate of \$278.68 per week or \$7,635.83 followed by 104.14 weeks of permanent partial disability compensation at the rate of \$278.68 per week or \$29,021.74 for a 78% work disability followed by 94.34 weeks of permanent partial disability compensation at the rate of \$278.68 per week or \$26,290.67 for a 49.3% work disability, making a total award of \$62,948.24.

As of February 24, 2005 there would be due and owing to the claimant 27.4 weeks of temporary total disability compensation at the rate of \$278.68 per week in the sum of \$7,635.83 plus 120.89 weeks of permanent partial disability compensation at the rate of \$278.68 per week in the sum of \$33,689.63 for a total due and owing of \$41,325.46, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$21,622.78 shall be paid at the rate of \$278.68 per week for 77.59 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director